Supreme Court, U.S.
FILED
JUL 9 1992
OFFICE OF THE CLERK

92-196
No. _____

In the Supreme Court of the United States

October Term, 1992

LEONOR GARCIA GARCIA

Petitioner,

V.

THE TEXAS DEPARTMENT OF HUMAN SERVICES, AND PATRICIA BYRNES, INDIVIDUALLY AND IN HER CAPACITY AS AN AGENT OF THE TEXAS DEPARTMENT OF HUMAN SERVICES

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States District Court Judge Emilio M. Garza, improperly presided over and ruled on Petitioner's Motion for Summary judgment.

II. Whether Petitioner **LEONOR GARCIA'S** claims are barred by the Doctrine of Res Judicata.

III. Whether summary judgment was improperly granted in that evidence was presented which raised a genuine issue of material fact as to Petitioner's equal protection and due process claims.

IV. Whether the federal district court acted improperly in dismissing Petitioner's tort claim of intentional infliction of emotional distress in that Petitioner presented sufficient evidence to establish a genuine issue of material fact.

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Petitioner, **LEONOR GARCIA**, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered April 15, 1992.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Court whose judgment is sought to be reviewed are contained in the caption of the case in this Honorable Court.

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OPINION BELOW

The Judgment of the United States Court of Appeals for the Fifth Circuit was issued in an unpublished opinion, a copy of which is appended hereto as an Appendix.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This petition seeks review of the decision of the United States Court of Appeals for the Fifth Circuit, announced on April 15, 1992. This petition is timely filed within ninety days after judgment. Rule 13.1, Supreme Court Rules.

Jurisdiction of this Court to review the judgment in question by writ of certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States declares, in pertinent part: Section 1... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C. § 1983. declares, in pertinent part: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Rule 54, Federal Rules of Civil Procedures provides the following provides as to the pertinent part:

> Judgment as used in these rules includes a decree and order from which an appeal lies...

Rule 15(a), Federal Rules of Civil Procedures provides the following provides as to the pertinent part:... and leave shall be freely given when justice so requires...

STATEMENT

Petitioner, **LEONOR GARCIA** was employed by Respondent the Texas Department of Human Services ("T.D.H.S.") on August 1, 1984. Respondent Patricia Byrnes was Petitioner's supervisor at the T.D.H.S. during her term of employment from 1984 to 1988.

On September 11, 1986, Petitioner filed an age discrimination complaint against the T.D.H.S. with the Equal Employment Opportunity Commission ("E.E.O.C."), alleging that she had been denied promotions by Byrnes and the T.D.H.S. solely because of her age. As a result of filing this complaint, Petitioner alleges that she became subject to harassment by Byrnes. Specifically, Petitioner complains that on November 17, 1986, she met with Byrnes to discuss her absence from work on November 13 and

14, 1986. This meeting took place because Petitioner allegedly had failed to call in to report her absence in accordance with T.D.H.S. regulations. While Petitioner contends that she called in, the result of the meeting was that Byrnes issued a written reprimand to Petitioner on November 24, 1986. In addition to the inaccuracy of the complaint, Petitioner alleges that Byrnes failed to follow the proper T.D.H.S. procedures for handling this matter and that the reprimand was an act of retaliation against Petitioner **LEONOR GARCIA** for filing the complaints with the T.D.H.S. and the E.E.O.C.

Further, **LEONOR GARCIA** alleges that in February,1987, Byrnes assigned her work knowing that it would cause Petitioner, who had a history of back trouble, to further injure her back. Petitioner alleges that this injury forced her to take a medical leave of absence from February 1987 to January 4, 1988. While on leave, Petitioner alleges that Byrnes harassed her by threatening to terminate her employment

with the T.D.H.S. As a result of this harassment, Petitioner filed retaliation charges with the E.E.O.C. against Byrnes and the T.D.H.S. on June 30, 1987.

On December 4, 1987, while Petitioner **LEONOR GARCIA** was still recuperating from back surgery, there is evidence that some initial steps were taken to terminate her. On a form entitled "Supervisor Report of Employee Separation," Byrnes stated that **LEONOR GARCIA'S** services were unsatisfactory, that she did not adhere to work rules, that she did not meet job requirements, that she had a poor attitude toward her work, and that she did not get along well with her co-worker. Petitioner alleges that this evaluation was not only false but inaccurate and done solely as retaliation against her for the charges of discrimination and harassment she had filed. Further, **LEONOR GARCIA** alleges that the exit interview was conducted in her absence.

LEONOR GARCIA'S termination, however, did not become effective. In fact, neither Petitioner nor her attorney were notified of this action. When Petitioner returned to work on January 4, 1988, she was placed in the Intake Clerk position, a position she had held since 1985. Petitioner claims that although her physical problems restricted her ability to perform the duties involved in this job, she not only had to fill this job, but was assigned additional duties as well.

Further, Petitioner alleges that on January 22, 1988, she was forced to take a job performance exercise to compete for the right to remain in her position as Intake Clerk, which was among four clerical positions in the office that had been upgraded from Clerk II to Clerk III. Petitioner alleges that the grounds for this competition was retaliation and discrimination by Byrnes.

As a result of her performance in the job competition, on February 9, 1988, Petitioner was reassigned from her position as Intake Clerk to the position of Filer-Puller, the lone remaining Clerk II position. A result of the physical exertion required by this job, she re-injured her back and was forced to leave her employment with the TDHS on May 15, 1988.

In sum, Petitioner **LEONOR GARCIA** alleges that over the course of her employment, and particularly in the last three years, she was continually subjected to discriminatory acts by Byrnes. Byrnes' alleged motivation was a combination of race, national origin and age discrimination.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN UPHOLDING JUDGE EMILIO M. GARZA'S DECISION TO PRESIDE OVER AND RULE ON PETITIONER LEONOR GARCIA'S MOTION FOR SUMMARY JUDGMENT.

The Order signed by the Honorable Judge Edward C. Prado on January 25, 1990, was a final Order upon which appeal lies which held that Judge Emilio M. Garza was precluded from preceding over this case.

The Court on September 21, 1990, signed an agreed pre-trial Order in which Judge Prado denied Respondent's Motion for Judge Emilio M. Garza to preside over the case. Therefore, as previously argued, under the law of the case Judge Prado's Order precluding Judge Emilio M. Garza from hearing the case was binding on the court. It was an abuse of discretion on the part of Judge Garza to rule on Respondent's Motion For Summary Judgment, and the Judgment as entered is void.

Contrary to Respondent's argument, the Order of the Court became a final one. If the assignment of the case to Judge Emilio Garza was out of judicial necessity, a new Order should have been rendered with an opportunity for all parties to object. To ignore an Order of the Court as Judge Emilio Garza did is nothing more than a clear violation of said Order, and an abuse of discretion.

Rule 54, F.R.C.P provides the following as to the definition of a judgment:

> "Judgment as used in these rules includes a decree and order from which an appeal lies. A judgment shall not contain a recital of pleading, the report of a master, or the record of prior proceedings.

A judgment "is the act of the court". Rendition of judgment signifies the pronouncement or annunciation of the adjudication or judgment of the court. Apart from the 1963 amendment to Rule 58, infra, while a judgment need not be rendered, i.e., pronounced, in any particular way, but could be oral or written, it must constitute a present

adjudication. Moore's Federal Practice, § 54.02; United States v. F.& M. Schaefer Brewing Co., 356 U.S. 227, 78 S. Ct. 674, 2 L.Ed. 2d 721 (1958).

Thus, clearly Judge Edward C. Prado's Order of January 25, 1990, was a final judgment upon which appeal lies. Under the doctrine of the law of the case, a decision at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation.

The Fifth Circuit Court of Appeals erroneously found that because Judge Prado's decision was rooted in administrative convenience rather than judicial precedent or statutory construction there can be no "law of the case" where there is no ruling on the law. This position is clearly erroneous and without foundation. In essence the court has held that an Order may be disposed of without granting the parties an opportunity to object to the same. This cannot possibly be the law.

Therefore, Petitioner **LEONOR GARCIA** respectfully submits that Judge Emilio Garza's ruling on Respondent's Motion For Summary Judgment is void and this honorable court should so hold.

II. PETITIONER LEONOR GARCIA'S CLAIMS ARE NOT BARRED BY RES JUDICATA.

Petitioner's first suit was an age discrimination action based on the failure of TDHS to promote her to four positions for which she applied. It was an action alleging that Petitioner **LEONOR GARCIA** was subject to discriminatory treatment by T.D.H.S. **LEONOR GARCIA'S** second suit contains allegations that she was discriminated against and harassed because she had filed complaint(s), retaliation claim(s) with the E.E.O.C. against Respondent. Respondent has asserted that Petitioner's cause of action on the retaliation claim was presented to the court in Petitioner's first suit, in Cause No. SA-88-1399 on September 7, 1989. This is not entirely true, and simply an attempt by

the Respondent to mislead the court.

The Court on September 25, 1989, denied Petitioner **LEONOR GARCIA'S** Fourth Amended Motion as being untimely. Therefore, Petitioner was never granted the opportunity to present in her first suit the retaliation claim, as included in the above mentioned motion to amend which was erroneously denied by the district court. Therefore, the Respondent's assertion is false, and **LEONOR GARCIA** had no choice but to file the second law suit.

Four requirements must be met in order to apply Res Judicata: (1) the parties must be identical in both suits; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) there must be a final judgment on the merits; and (4) the same cause of action must be involved in both cases. Nilsen v. City of Moss Point,Miss., 701 F 2d 556, 559 (5th Cir.) (en banc); Howell Hydrocarbons,Inc. v. Adams, 897 F.2d. 183, 188 (5th Cir. 1990).

The Fifth Circuit Court cited as authority

Nilsen v. City of Moss Point, Miss., 701 F.2d 556, 559 (5th Cir. 1983) (en banc) and Matter of Howe, 913 F.2d 1138 (5th Cir. 1990), in ruling that Res Judicata applies to the instant case. The Court erroneously found that Petitioner **LEONOR GARCIA** as a litigant failed to advance all her claims in the initial proceeding in a timely fashion. The Court further held that since Petitioner **LEONOR GARCIA** failed to adhere to the scheduling deadline as set by the court, that she is to blame for not bringing all her claims in the first place.

Contrary to the Fifth Circuit Court's erroneous decision, **LEONOR GARCIA** has not had her day in court. The district court clearly abused its discretion by denying Petitioner's Fourth Motion for Leave to Amend, thus the court, not Petitioner precluded her from litigating her causes of action in the same proceeding, thereby avoiding the preclusive effect of res judicata.

Respondent's position that Petitioner's claims are barred by res judicata is plausible at first glance, but upon closer evaluation, it is not persuasive in that the four requirements of res judicata have not been met in this case.

Petitioner attempted to amend her complaint to avoid "splitting of the litigation". However, Petitioner's Motion to Amend was improperly denied by the trial Court. Contrary to Respondent's argument that an "unexplained dilatoriness" on the Petitioner's part split her cause of action, the cause was an abuse of discretion by the former court in denying Petitioner's Motion to Amend to include her claims.

Pursuant to F.R.C.P 15, leave to amend is to be freely granted when justice so requires. In Foman V. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed. 2d 222 (1962), the court emphasized:

> "Rule 15 (a) Federal Rules of Evidence, declares that leave to amend shall be freely given when justice so requires'; this mandate is to be heeded. See

> generally, 3 Moore, Federal Practice, (2d ed. 1948) ¶ 15.08, ¶ 15.10. If the underlying facts or circumstance relief upon by a Plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the Movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave sought should, as the rules require, by freely given. Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." See also Zenith Radio Corp. v. Hazeltine Research, Inc., (1971) 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed. 2d 77 (prejudice must be taken into account by trial court).

Petitioner **LEONOR GARCIA'S** Fourth Motion to Amend was timely and would not have cause undue delay. Furthermore, the Respondent did not show that the granting of Petitioner's amendment would create undue hardship, was filed with an improper purpose or that Respondent would suffer any prejudice if the amendment was permitted. Zenith Radio Corp, supra, at 87. A showing of

prejudice is required, there was none in this case and the court improperly did not take prejudice into account. This constitutes error.

The facts of this case are readily distinguishable from those of Nilsen, supra and the facts as presented by the Respondent to this court are erroneous. Petitioner's initial complaint was filed on January 17, 1989. The Fourth Motion to Amend was filed on September 7, 1989, within eight months of the filing of the lawsuit, within twenty-one days (emphasis ours) of Respondent's late filing of its original answer on August 17, 1989, and well before the trial date of October 23, 1989. Furthermore, the Scheduling Order allowed filing of all motions on or before September 15, 1989. Petitioner, **LEONOR GARCIA** filed on September 7, 1989, to avoid the res judicata problem and to comply with the deadline of September 15, 1989. To deny Petitioner's request to amend her complaint clearly constitutes an abuse of discretion by the trial court and is manifestly

unfair.

Unlike the application to amend the complaint to late in Nilsen v. City of Moss Point, supra, Petitioner in this case amend her pleading in a timely manner. In Nilsen supra, at 563, Ms. Poe tried to amend her complaint on the first day of trail (emphasis ours). In this case Petitioner **LEONOR GARCIA** did not wait until October 23, 1989, the scheduled trial date to amend. The facts are readily distinguishable. To rule as the Fifth Circuit Court of Appeals did has denied **LEONOR GARCIA** justice and her day in court.

It should be noted that case law supports Petitioner's position. She was entitled to amend her complaint to add a count alleging that the Respondent retaliated against her after she filed suit; since the Respondent failed to show that it would suffer any prejudice if the amendment was permitted Sturgess v. Negley, 761 F. Supp. 1089. (D. Del. 1991). Furthermore, delay alone does not warrant denial of leave to

amend a pleading, Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1212 (3rd Cir. 1984), and in this case there is no evidence of any undue or unexplained delay indicating bad faith by Petitioner. Sturgess, Supra, at 1099.

It can be concluded that it was the Court by its action in denying the Petitioner's Fourth Motion to Amend and not the Petitioner that prevented her from litigating the retaliation claim pursuant to 29 U.S.C. § 623 (e) and; therefore, because of the reasons cited above the issue should not be precluded by Res Judicata.

Res Judicata is not appropriate in this case. It is black letter law that a claim is not barred by res judicata if it could not have been brought. If the court rendering judgment through its procedural rules made it impossible to raise a claim, then it is not precluded Browning v. Navarro 887 F.2d 553, 558 (5th Cir. 1989) ; D-1 Enterprises, Inc v. Commercial State Bank, 864 F.2d 36 38-39 (5th Cir. 1989).

Contrary to the Fifth Circuit Court's ruling the procedural system of the forum precluded the joinder of all of Petitioner **LEONOR GARCIA'S** claims, not an "unexplained dilatoriness" on her part. Matter of Howe, 913 F.2d 1138, 1145 (5th Cir. 1990). To hold otherwise would be manifestly unfair.

Finally, the court improperly found in its order granting Respondent's Motion For Summary Judgment as to T.D.H.S. that the cause of actions asserted by Petitioner in the second case, DR-89-CA-38 were identical to the first cause of action and should have been asserted in the prior litigation SA-88-CA-1399. The Court cited as authority Nilsen, supra. Clearly there can be no finding of Res Judicata if as in the instant case the Court and not the litigant does the splitting of litigation to present her claim. Nilsen v. City of Moss Point, Miss., 701 F.2d 556, 562-563 (5th Cir. 1983) Browning v. Navarro 887 F.2d 553, 558-559 (5th Cir. 1989). Petitioner **LEONOR GARCIA** tried to bring her

retaliation claims in the first suit, but the Court would not allow her to amend. Petitioner simply could of amended her then pending discrimination complaint and argued the retaliation claim, but she was not allowed to do so. See Langston v. Ins. Co. of North America 827 F.2d 1044 (5th Cir. 1987).

As stated in the dissenting opinion in Nilsen, supra, at 565

> "The discretion given a court to deny an amendment is a valuable working tool. It is no more. Here reliance on that denial to bar adjudication of a constitutional claim conflicts with the first rule of the Federal Rules of Civil Procedure: "[The rules] shall be construed to secure the just, speedy, and inexpensive determination of every action". The decision of the Court in banc also conflicts with common sense. Putting to one side the quibbles associated with what constitutes a decision on the merits, **it is evident that Nilsen never had a day in court on the substance of her constitutional claim and that this claim failed to receive a just determination by this Court. I cannot stand aside and bow to injustice in the name of formalism**(emphasis ours).

Please note Nilsen, was a split decision with six justices dissenting. The Fifth Circuit

Court has stood aside and has bowed to injustice in the name of formalism with its victim being a human being, Petitioner **LEONOR GARCIA.**

The matter should be remanded back to the Federal Court for trial on the merits since Res Judicata is not appropriate in this case.

III. SUMMARY JUDGMENT WAS IMPROPERLY GRANTED IN THAT SUFFICIENT EVIDENCE WAS PRESENTED TO RAISE A GENUINE ISSUE OF MATERIAL FACT AS TO PETITIONER'S EQUAL PROTECTION AND DUE PROCESS CLAIMS.

a. **EQUAL PROTECTION CLAIM**

The Fifth Circuit Court of Appeals erred in upholding the district court's finding and by holding that Petitioner **LEONOR GARCIA** failed to present any evidence that Respondent Byrnes intentionally discriminated against her. Thus, finding that **LEONOR GARCIA** has failed the Johnson standard. See Johnson v. Chapel Hill Indep. School Dist., 853 F.2d 375 , 381 (5th Cir. 1988).

Contrary to the court's position, Petitioner has provided sufficient evidence of discriminatory or disparate treatment, intentional discrimination, discriminatory motive, or evidence to support her equal protection claims. Respondent Byrnes did not meet her burden of showing that there is no genuine issue of fact for a Motion for Summary Judgment to be granted. The moving party Byrnes has the burden to identify those portions of pleadings, depositions, answer to interrogatories, and admission of file, if any, together with affidavits which it believes will demonstrate the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 91 L.Ed. 2d 265, at 274 (1986). This, the Respondent did not do.

The Fifth Circuit Court erroneously believes that Petitioner **LEONOR GARCIA** must prove up her claim without the benefit of a trial by jury. This is not the law. Petitioner need only allege and proved any proof that she

has been treated dissimilar to her fellow co-workers based upon her race, color, religion, sex or national origin, and that the Respondent, Byrnes, intentionally violated her constitutional rights Johnson v. Chapel Hill Indep. School Dist, 853 F.2d 375, 381 (5th Cir. 1988). Clearly this has been alleged, and proven up sufficiently for Summary Judgment purposes.

Petitioner unlike other co-workers equal protection rights were violated in that she was terminated without notice from her employment. Appellant's Affidavit Exhibit "D" and attached exhibits to the Affidavit indicating that Petitioner **LEONOR GARCIA** was terminated while she was ill, without a hearing. **LEONOR GARCIA** was not accorded the right to be present at the exit interview prior to termination from employment, nor provided notice before being terminated. These facts show disparate treatment (emphasis ours). Therefore, theses actions contrary to Respondent's position

constitute an intentional, arbitrary and capricious fashion or acts by Respondent Byrnes in violation of Petitioner's equal protection rights.

If the Respondent Byrnes, actions were motivated by impermissible motives or illegitimate ends or if her actions were arbitrary and capricious is to be determined by the jury. The Petitioner has alleged and submitted sufficient proof to raise factual issues concerning the actions of the Respondent.

Contrary to Respondent's position a review of Petitioner's Summary Judgment evidence clearly illustrates that she presented evidence supporting the equal protection violations.

With a material fact at issue, this case was not appropriate for the granting of summary judgment. The district court is not charged with trying issues of fact on a Rule 56 motion but can only determine whether there are issues to be tried. Southern Distributing Co. v. Southdown,Inc., 574 F. 2nd 824, (5th Cir. 1978).

It is clear from the Court's ruling that it was trying the issue of fact and that its ruling was not as to whether there were issues of facts to be tried, but that the Petitioner presented insufficient facts to prevail on her equal protection claim. Accordingly, the court with respect to Petitioner **LEONOR GARCIA** equal protection claims erred in granting Respondent Byrnes', Motion for Summary Judgment and the matter should be remanded back to the district court for trial.

b. **DUE PROCESS CLAIMS**

Contrary to the Fifth Circuit Court's position the record reflects that Petitioner **LEONOR GARCIA**, did have a property interest in a promotion to Clerk III position with T.D.H.S. Bishop v. Wood, 426 U.S. 341, 343-47, 96 S.Ct. 2074, 2076-79 (1976). As the Bishop court noted:

> The Due Process Clause provides 'nor shall any state deprive a person of life, liberty or property without due process of law.' In order to state a cause of action for violation of the Due Process Clause under Section 1983, the [plaintiff] must

> show that [she] had asserted a recognized 'liberty or property' interest within the purview of the Fourteenth Amendment; and that [she was] intentionally or recklessly deprived of that interest, even temporarily, under color of state law.

In regard to Petitioner **LEONOR GARCIA'S** due process claim, the Respondent's argument misrepresents the facts before this court. Petitioner was entitled to be placed in a Clerk III position constituting a property interest (emphasis ours). Respondent refers to an improper regulation to show that Petitioner was not entitled to an automatic promotion. The Fifth Circuit also erroneously relied upon such flawed reasoning.

Rule 1000, 1924 Texas Department of Human Services regulations provides that Petitioner the incumbent in the intake scheduler position should have been promoted to the Clerk III position of intake on January 4, 1988. Respondent, Byrnes intentionally and with malice having knowledge of Rule 1000, 1924 forced **LEONOR GARCIA** to compete for her position which she was entitled to keep due to the rule cited

above.

It is clear that there was evidence before the Court that Petitioner's property interest is an "automatic promotion" to the Clerk III position (emphasis ours). Respondent chose to disregard Rules 1000, 1924 T.D.H.S. Regulation and force the Petitioner to compete for the Clerk III position. Further, **LEONOR GARCIA'S** employment had been terminated without prior notice to her by the Respondent which in this case would be the property interest in her job. Therefore, reviewing the Respondent's conduct there was a material issue of fact as to whether Respondent intentionally or recklessly deprived Petitioner of the Clerk III position and her job. The Court's ruling in this case a final disposition or trying of the facts on a Rule 56 motion which is beyond the scope of Rule 56 of the Federal Rules of Civil Procedure which limits the Court to the question as to whether there are material facts regarding the claim of which there are issues to be tried. Southern

Distributing Co. V. Southdown, Inc. 574 F.2d 824 (5th Cir. 1978).

Moreover, Respondent's argument that Byrnes is not at fault is without merit. Byrnes' conduct caused the deprivations. In December 4, 1987, Respondent Byrnes through her actions intentionally and with malice knowing that Petitioner **LEONOR GARCIA** was on workman's compensation terminated her employment. In Lopez v. Houston Independent School District, 817 F.2d 351 (5th Cir. 1987) the court held that conduct which amounts to callous indifference is sufficient to find the actions to be intentional.

The property interest is Petitioner's employment and in an automatic promotion is clear. Petitioner was intentionally or recklessly deprived of that interest. Even if the deprivation is temporary it is a violation of her rights Griffith v. Johnston 899 F.2d 1427, 1435 (5th Cir. 1990). Under traditional notions of due process the Fourteenth Amendment

is "intended to secure the individual from the arbitrary exercise of the powers of government "which results in "grievous losses" for the individual, (emphasis added). Kentucky Dept. of Corrections v. Thompson ___ U.S. ___, 109 S.Ct. 1904, 1909, 104 L.Ed. 2d 506 (1989).

Accordingly, the Fifth Circuit Court with respect to Petitioner's due process claims erred, and the matter should be remanded back to the Federal District Court for trial.

IV. THE FIFTH CIRCUIT COURT ACTED IMPROPERLY IN UPHOLDING THE DISMISSAL OF PETITIONER'S TORT CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IN THAT PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT.

The Fifth Circuit Court's decision in this regard is incorrect and utterly without foundation. Petitioner **LEONOR GARCIA** has satisfied the elements of the Texas common law tort of intentional infliction of emotional

distress. There is a showing by Petitioner that Respondent Byrnes engaged in extreme and outrageous conduct, causing severe aggravation to **LEONOR GARCIA'S** injury. Assigning the Petitioner to the position of filer-puller under the circumstances did constitute conduct so "outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency...." Wilson v. Monarch Paper Co., 939 F.2d 1138, 1142 (5th Cir. 1991). Although this was an office wide assignment, with the medical evidence available to Respondent Byrnes she was under a duty to follow the clear medical restrictions placed on Petitioner **LEONOR GARCIA** (emphasis ours). To disregard it, is clearly outrageous, and so extreme, as to go beyond the bounds of decency Wilson, Supra, 1142.

Respondent Byrnes knew that Petitioner **LEONOR GARCIA** had suffered a severe back injury, and that she was restricted by her physician from performing the duties of a filer/puller which previously caused her back injury. To

consciously disregard the medical on file knowing that if said medical was not adhered to it would cause further injury to Petitioner not only constitutes at the very least reckless conduct by Respondent Byrnes but is real evidence of extreme and outrageous conduct. Byrne's decision created an intolerable work environment for Petitioner; whereby, on a daily basis she had to endure a great amount of pain, disregard the medical restrictions, and constantly aggravate her back injury. For all practical purposes the Respondent placed a knife in Petitioner **LEONOR GARCIA'S** back and twisted. A person need only have endured a back injury to readily understand the amount of pain involved.

Thus because of Petitioner's exertional limitation (back injury), severe aggravation of her back injury due to Respondents' conscious disregard of all relevant medical facts, and Petitioner's need to follow her supervisor's directives, she clearly has suffered severe emotional distress. Respondent's conduct has

gone beyond all possible bounds of decency Wilson v. Monarch Paper Co. 939 F.2d 1138, 1142 (5th Cir. 1991).

Respondent's position is that the above was a personnel decision made in the ordinary course of business. Further that Respondent's conduct does not support a finding or outrageous conduct. Petitioner **LEONOR GARCIA** disagrees, under Dean v. Ford Motor Credit Co. 885 F.2d 300, (5th Cir. 1989), and Wilson supra said conduct is outrageous, because there is ample proof that the supervisor intentionally disregarded the medical restrictions to make it appear the Petitioner was not willing to perform her job duties and/or to put her in fear of losing her job.

The fact which takes this case out of the realm of an ordinary employment dispute was the Respondent's intentional and systematic disregard of the work place medical restrictions which resulted in injury and culminating humiliation to the Petitioner. Petitioner finds

it difficult to conceive a workplace scenario more painful and embarrassing that the position she had been placed in. Total humiliation was complete. Byrnes outright, set out to humiliate her in the hopes she would quit.

Furthermore, the Fifth Circuit Court's decision as to **LEONOR GARCIA'S** tort claim is clearly erroneous. What other intent would Byrnes have had when she assigned Petitioner to the filer/puller position, knowing of the medical restrictions placed on Petitioner due to her back injury? Petitioner need only place said issue at material controversy. It is an issue for the jury to determine if Respondent Byrnes, assigned Petitioner to the filer/puller position with intent to cause Petitioner injury and severe emotional distress.

Petitioner further asserts that the Court ruling on her tort claim is a final disposition of the facts of the case and not a finding that there are no material facts which a jury could hear. Therefore, the matter should be remanded

back to Federal District Court for Trial. See Southern Distributing Co. v. Southdown, Inc., 574 F.2d 824 (5th Cir. 1978).

Also, contrary to the Fifth Circuit Court's conclusion that Petitioner **LEONOR GARCIA'S** claim is a bare allegation, it is an allegation supported by medical evidence. Thus clearly Respondent Byrnes intentionally or recklessly placed Petitioner **LEONOR GARCIA** in a job situation that aggravated her back injury.

CONCLUSION

For the foregoing reasons, this Court should issue a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8484
Summary Calendar

LEONOR GARCIA GARCIA,

Plaintiff-Appellant,

v.

TEXAS DEPARTMENT OF HUMAN SERVICES, ET AL.,

Defendants-Appellees,

Appeal from the United States District Court
for the Western District of Texas
(DR-89-CA-38)

(April 15, 1992)

Before JONES, DUHE, and WIENER, Circuit Judges.[1] EDITH H. JONES, Circuit Judge:

Leonor Garcia Garcia ("Garcia") brought

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

suit against her employer, the Texas Department of Human Services ("TDHS" or "the Department"), for employment discrimination. Garcia, who also sued her clerical supervisor, Patricia Byrnes, alleged that she was not promoted because of her age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.. The case proceeded to trial, and on October 25, 1989, Judge Emilio M. Garza entered judgment for TDHS. Five days later, Garcia filed the action which triggered this appeal. In this second action, Garcia once again named TDHS and Byrnes as defendants, only this time she asserted violations of equal protection and due process under the U.S. and Texas constitutions, as well as a state common law tort claim of intentional infliction of emotional distress.[2]

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[2] Garcia's original complaint also alleged that her First Amendment rights had been violated, but she abandoned this claim prior to the district court's summary judgment hearing. Plaintiff also conceded that all claims arising before October 30, 1987, were barred by the statue of limitations and should therefore be dismissed.

Additionally, plaintiff raised an ADEA claim alleging that TDHS had retaliated against her for filing a complaint with the Equal Employment Opportunity Commission ("EEOC").

On August 2, 1991, Judge Garza granted summary judgment against Garcia in the second suit, finding that her claims against TDHS and Byrnes, acting in her official capacity, were barred by res judicata. The court further held that there was insufficient evidence to support Garcia's contention that Byrnes, acting in her individual capacity, had violated plaintiff's equal protection and due process rights, or that Garcia had been subjected to the tort of intentional infliction of emotional distress. We affirm.

BACKGROUND

The Department hired Garcia on August 1, 1984. Byrnes was her supervisor at TDHS from 1984 to 1988. On September 11, 1986, Garcia filed an age discrimination complaint with the EEOC against TDHS, alleging that she had been

denied promotions by Byrnes and the Department because of her age. As a result of filing this complaint, Garcia contended that Byrnes began to harass her and that TDHS continued to block her promotions. Specifically, Garcia alleged that on November 17 of that year, she met with Byrnes to discuss Garcia's absence from work on November 13 and 14. TDHS insisted that the meeting occurred because Garcia failed to call in to report her absence in accordance with Department regulations. For her part, Garcia contended that even though she called in, she received a written reprimand from Byrnes on November 24 that was not only inaccurate, but prepared in violation of proper TDHS procedures for handling such complaints.

Garcia also alleged that in February 1987, Byrnes assigned her to work knowing it would cause her back trouble, causing her to injure her back. She claims that this injury forced her to take a medical leave of absence from February 1987 to January 4, 1988. During that

time, Byrnes allegedly harassed her by threatening to fire her, prompting Garcia to file retaliation charges with the EEOC against Byrnes and the Department on June 30, 1987. Plaintiff also claimed that on December 4, 1987, while she was recuperating from back surgery, initial steps were taken to terminate her. Specifically, on a form entitled "Supervisor Report of Employee Separation," Byrnes stated that plaintiff's services were unsatisfactory, that she did not adhere to work rules, meet job requirements, exhibit a proper attitude toward her work, or get along well with her fellow employees. Garcia challenged both the accuracy of this evaluation and the procedures by which it was prepared. However, Garcia was never terminated, and neither she nor her attorney was notified of the report. When plaintiff returned to work on January 4, 1988, she was placed in the position of Intake Clerk, the same position she had held since 1985. Garcia claimed that even though her physical problems restricted her

ability to perform this job, she was expected to perform her previous duties as well as additional ones.

According to Garcia, Byrnes retaliated against her again on January 22, 1988, by forcing her to take a job performance exercise to compete for the right to remain in her position as Intake Clerk, which was among four clerical positions in the office that had been upgraded from Clerk II to Clerk III. As a result of her performance in this competition, plaintiff was reassigned from her position as Intake Clerk to Filer-Puller, the lone remaining Clerk II position. Because of the physical exertion required by this job, Garcia claims that she reinjured her back and was forced to quit TDHS on May 15 of that year.

After investigating Garcia's complaint, the EEOC found that her age discrimination and retaliation complaints of September 11, 1986 and June 30, 1987, did not violate the ADEA. With respect to the alleged retaliation by Byrnes,

the Commission noted that Garcia had admitted to not calling in to report her absence on November 13 and 14, 1986. The EEOC also found that Garcia was denied promotions because she was less qualified than the other applicants. At her request, the EEOC agreed to review its initial determination, but on November 29, 1988, it issued a final determination that "the evidence obtained is not a supported finding of age discrimination or retaliation with respect to harassment and job assignments."

In January 1989, Garcia brought suit for the second time in the court below against TDHS, and Judge Garza's decision to grant summary judgment in favor of the defendants prompted this appeal.[3]

DISCUSSION

In granting defendant's motion for summary

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[3] Byrnes was a named defendant in the original and first amended complaints, but her name was dropped from plaintiff's second amended complaint.

judgment, Judge Garza held that plaintiff's claims against TDHS and Byrnes, acting in her official capacity, were barred by the doctrine of res judicata. The court further concluded that insufficient evidence had been presented to support Garcia's allegation that Byrnes, acting in her individual capacity, had violated plaintiff's equal protection and due process rights. Finally, plaintiff's tort claim of intentional infliction of emotional distress was also denied for insufficient evidence. We address each of the district court's finding in turn.

LAW OF THE CASE

As we have noted, Judge Garza issued his Findings of Fact Conclusions of Law in the first case on October 25, 1989. See Garcia v. Texas Department of Human Services, No. SA-88-CA-1399 ("Garcia I"). Five days later, plaintiff filed Garcia v. Texas Department of Human Services, et al., No. DR-89-CA-38 ("Garcia II"), which was assigned to U.S. District Judge Edward C. Prado.

The Department, arguing that the facts at issue in Garcia II were essentially the same as those previously decided by Judge Garza in Garcia I, filed a motion for Judge Garza to preside over the case. Judge Prado denied this motion on January 25, 1990. Nonetheless, Garcia II was in fact reassigned to Judge Garza on August 23, 1990. Appellant's res judicata theory rests on Judge Prado's initial decision not to reassign the case to Judge Garza. Specifically, Garcia contends that Judge Prado's denial of the Department's motion to reassign constituted the "law of the case," thereby precluding Judge Garza's further participation and rendering his subsequent ruling in Garcia II a nullity.

Technically, Judge Prado's original ruling denying defendant's motion to reassign Garcia II to Judge Garza was an "order," but appellant is mistaken in contending that this order was therefore a ruling which, under the law of the case doctrine, could not be reconsidered. Indeed, the plain language of that order shows

its discretionary character. Judge Prado denied defendant's request that the case be reassigned to Judge Garza as a matter of administrative convenience.[4] Had Judge Prado continued to preside over the case, we agree with his statement in the order that "[i]ssues of res judicata and collateral estoppel may be raised before the undersigned as easily as before Judge Garza." In other words, Judge Prado was equally capable of addressing defendant's res judicata and collateral estoppel claims as was Judge Garza, to whom Garcia I was tried. This is a far cry from suggesting that Judge Garza was forbidden to examine those claims because administrative convenience later warranted that Garcia II be reassigned to him. Because Judge Prado's decision was rooted in administrative convenience rather that judicial precedent or

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[4] By the time the case was reassigned to Judge Garza on August 23, 1990, it had been determined that Judge Prado would no longer preside in the U.S. District Court for the Western District of Texas, Del Rio Division.

statutory construction, there can be no "law of the case" where there is no ruling on the law.

Res Judicata

Appellant next challenges the district court's finding that her claims against TDHS and Byrnes, acting in her official capacity, were barred by res judicata.[5] For a prior judgment to bar subsequent litigation on the basis of res judicata,

> the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final

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[5] As we have noted, the court below considered the merits of these claims, concluding that there was insufficient evidence to support them. We question whether it was necessary even to make this inquiry, however, because Byrnes was necessary even to make this inquiry, however, because Byrnes was probably in privity with her employer for res judicata purposes. The substantial identity of her interests with those of TDHS strongly suggests that the claims against Byrnes in her individual capacity should be given the same preclusive effect as the claims against the Department. Compare Gorelick v. Harrison County, 720 S.W.2d 835, 836 (Tex Civ. App.--Tex.1986). We need not decide this question, however, in view of our holding that Garcia cannot prevail on the merits of her constitutional claims.

> judgment on the merits and the same cause of action must be involved in both cases.

Latham v. Wells Fargo Bank, N.A., 896 F.2d 979, 983 (5th Cir. 1990) (quoting Nilsen v. City of Moss Point, 701 F.2d 556, 559, (5th Cir. 1983) (en banc)). Applying this framework, there is no question that the parties were identical in both suits, or that Garcia I was a final judgment rendered by a court of competent jurisdiction. Garcia contends that the two cases involved different causes of action, but this argument is unpersuasive. As the court below correctly recognized, Nilsen adopted the "transactional test" of the Restatement (Second) of Judgements for determining whether two suits involve the same cause of action for res judicata purposes. Under this approach, the key issue is not the relief requested or the theory asserted "but whether plaintiff bases the two actions on the same nucleus of operative facts." See Matter of Howe, 913 F.2d 1138, 1144 (5th Cir. 1990). Res judicata "bars all claims action on the occasion of its former

adjudication...not merely those that were adjudicated." Nilsen, 701 F.2d 559. We agree with the court below that both suits were based on operative facts that occurred during the same period of Garcia's employment at TDHS.

Appellant attempts to evade the full force of res judicata by insisting that the district court's refusal to let her amend her complaint prevented her from raising all her claims in Garcia I. While it is true that the Nilsen court recognized an exception to the res judicata doctrine when the court itself is responsible for claim-splitting, see 701 F.2d at 563, here it was Garcia who did the splitting. Nilsen distinguished between a court that precluded the parties from litigating their causes of action in the same proceedings, thereby avoiding the preclusive effect of res judicata, and litigants who fail to advance all their claims in the initial proceeding in a timely fashion. Id. The district court did not abuse its discretion by denying plaintiff's

fourth motion for leave to amend her complaint when the delay between the accrual of the cause of action and that motion spanned more than two years, and where that motion was denied as untimely. Thus, the reasoning of Nilsen applies with equal force here:

> The doctrine of res judicata contemplates, at a minimum, that courts be not required to adjudicate, nor defendants to address, successive actions arising out of the same transaction, asserting breach of the same duty. To reward [Garcia] for her own delinquency by permitting her to maintain this action would be clearly at variance with this principle. We decline to do so.

701 F.2d at 563. Because Garcia failed to adhere to the scheduling deadline set by the court, she is to blame for not bringing all her claims in the first proceeding. Appellant has had her day in court, and her claims against TDHS and against Byrnes, acting in her official capacity, are therefore barred by res judicata.

Constitutional Claims

Appellant further contends that the district court erred in granting summary judgment in favor of Byrnes, acting in her

individual capacity, for violating her equal protection and due process rights. For summary judgment to be granted, the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, must demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "In reviewing a grant of summary judgment, all legitimate factual inferences by the record are drawn in favor of the party opposing the motion." Boze v. Branstetter, 912 F.2d 801, 804 (5th Cir. 1990) (per curiam). Applying this standard to Garcia's equal protection claim, appellant fails to present any evidence that byrnes intentionally discriminated against her. Johnson v. Chappell Hill Indep. School Dist., 853 F.2d 375, 381 (5th Cir. 1988). Indeed, Garcia has not even shown that Byrnes subjected her to unequal treatment.

Thus, even assuming the truth of her

allegations, Garcia has failed to satisfy the Johnson standard. She has not shown that her absence from the exit interview made a difference in Byrnes's decision to terminate her. Moreover, the exit interview took place on December 4, 1987, yet when Garcia returned to work on January 4, 1988, her job was waiting for her. We therefore agree with Judge Garza that "even if plaintiff had produced any evidence that she was treated differently than other similar situated individuals, plaintiff was not terminated and therefore, it is not clear that the lack of a hearing in the manner in which the interview was conducted could amount to a constitutional violation."[6]

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[6] Our holding applies with equal force to appellant's equal protection claims under the Texas constitution. "[T]he Equal Protection Clause of the United States Constitution has been held to be coextensive with Article 1, § 3 of the Texas Constitution." Goheen v. Koester, 794 S.W.2d 830, 834 n.3 (Tex. Ct. App. 1990, writ denied) (citing Twiford v. Nueches County Appraisal Dist., 725 S.W.2d 325, 328 n.5 (Tex. Ct. App. 1987, writ ref'd n.r.e.)).

Garcia also claims that Byrnes violated her rights under the due process clauses of the United States and Texas constitutions. The court below found this argument to be without merit, and we agree. There is no showing that Garcia had a property interest in a promotion to Clerk III at TDHS. Bishop v. Wood, 426 U.S. 341, 343-347, 96 S.Ct. 2074, 2076-79 (1976). As this court has noted:

> The Due Process Clause provides 'nor shall any state deprive a person of life, liberty or property without due process of law.' In order to state a cause of action for violation of the Due Process Clause under Section 1983, the [plaintiff] must show that [she] had asserted a recognized 'liberty or property' interest within the purview of the Fourteenth Amendment; and that [she was] intentionally or recklessly deprived of that interest, even temporarily, under color of state law.

Griffith v. Johnston, 899 F.2d 1427, 1435 (5th Cir. 1990) (citations omitted), cert. denied, 111 S. Ct. 712 (1991). Garcia has presented no evidence whatsoever that her promotion to the Clerk III position was supposed to be automatic under Department regulations, but even accepting this statement as true, there is no indication

that Byrnes intentionally or recklessly deprived her of that interest. Moreover, and as the trial court pointed out, "Plaintiff's claim...must fail because Byrnes is not the person who made the decisions to upgrade the positions and to have the inhouse competition to fill them. These decisions were made by Carol Kelly. Thus, plaintiff has sued the wrong person." Because Garcia has neither specifically alleged that she had a property interest in continued employment with TDHS nor shown the Byrnes intentionally or recklessly deprived her of that interest, her due process argument must fail.[7]

Tort Claim

Finally, even assuming the truth of Garcia's allegations, she has failed to satisfy

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[7] Likewise, Garcia has not shown a due process violation under the Texas Constitution. Here again, the federal and state due process clauses are coextensive. See e.g. Price v. City of Junction, Tex., 711 F.2d 582, 590 (5th Cir. 1983); and Moore v. Port Arthur Indep. School Dist., 751 F.Supp. 671, 673 (E.D. Tex. 1990).

the elements of the Texas common law tort of intentional infliction of emotional distress.[8] To prevail on this claim, four elements must be satisfied. First, it must be shown that the defendant acted intentionally or recklessly. Next, the conduct must be "extreme and outrageous." Third, the actions of the defendant must cause the defendant emotional distress. Finally, that emotional distress must be severe. Dean, 885 F.2d at 306.

Applying these principles, there is no showing that Byrnes engaged in extreme and outrageous conduct, that she intended to cause Garcia injury, or that she displayed conscious

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[8] While the Texas Supreme Court does not expressly recognize this tort, see e.g., Brown v. American Transfer & Storage Co., 601 S.W.2d 931, 939 (Tex.), cert. denied, 449 U.S. 1015, 101 S.Ct. 575 (1980), this court has indicated that such a cause of action does exist in Texas, based on the Texas Court of Appeals's decision in Tidelands Auto Club v. Walters, 699 S.W.2d 939 (Tex. App.--Beaumont 1985, writ ref'd n.r.e.), error refused n.r.e. (1986). See Blankenship v. Kerr County, 878 F.2d 893, 898 (5th Cir. 1989) and Dean v. Fort Motor Credit Co., 885 F.2d 300 (5th Cir. 1989).

disregard as to whether Garcia would be injured. Assigning Garcia to the position of Filer-Puller, the only remaining Clerk II position, did not without more constitute conduct that was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Wilson v. Monarch Paper Co., 939 F.2d 1138, 1142 (5th Cir. 1991). All employees were assigned to perform the file pulling duties on February 4, 1987, as part of the Department's transition from the "case bank" to the "case load" system. This office-wide assignment was hardly extreme and outrageous. As for the February 9, 1988 incident, it is undisputed that Garcia was rated lowest of the five clerks competing for the four Clerk III positions. But this by itself does not show that Byrnes assigned her to the position of Filer Puller with the intention of causing her injury or with conscious disregard for the potential effects of this assignment.

Beyond these bare allegations, appellant has not shown that Byrnes intentionally or recklessly placed her in jobs that aggravated her back injury.

CONCLUSION

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

No._____

In the Supreme Court of the United States

October Term, 1992

LEONOR GARCIA GARCIA

Petitioner,

V.

THE TEXAS DEPARTMENT OF HUMAN SERVICES, AND PATRICIA BYRNES, INDIVIDUALLY AND IN HER CAPACITY AS AN AGENT OF THE TEXAS DEPARTMENT OF HUMAN SERVICES

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

The undersigned, attorney, a member of the Bar of this Court, certifies that pursuant to Rule 29.3, Supreme Court Rules, he served the within Petition for Writ of Certiorari on the Counsel for Respondent by enclosing a copy thereof in an envelope, with first-class postage

prepaid, addressed to counsel of record at her post office address:

Ms. Toni Hunter
Assistant Attorney General,
P.O. Box 12548
Capital Station, Austin, Texas 78711

and depositing same in the United States Post Office at Uvalde, Texas on July 21st, 1992, and further certifies that all parties required to be served have been served.

Respectfully submitted,

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